MEMORANDUM

FROM: Michael Miller, Esq.

TO : National Committee for Sexual Civil Liberties.

As a part of my resumé of developments in the State of New York, City of New York, I will be talking about a case that I am currently engaged in which I think will ripen into a significant New York case as a corollary to Bill Reynard's Gibson case. This is particularly true since the statutes involved in both cases are identical (both having been based upon the Model Penal Code. The section in issue is the "loitering for deviate sexual purposes" provision).

I will give my presentation with respect to this case orally, but I thought it would be important to memorialize in writing why I believe this case, and none of the hundreds of others that I previously handled, ripened into a Constitutional challenge. It is my purpose to call to your attention those factors which ultimately permitted a Constitutional challenge to be made in the hope that by isolating these factors, you will be helped in your efforts to spot the appropriate challenge for your respective states.

There are four major parties interacting in a criminal proceeding. Namely, there is the Judge, the District Attorney, the Defendant, and his Counsel. In my case (hereinafter referred to as the "Natal" case) each of the four aforementioned individuals would best serve his own interests by attempting a Constitutional challenge to the statute in issue. The Judge has a reputation for courage and innovation. He is reputed to be seeking promotion to our State Court of Claims. It would appear, therefore, that his attitude must be one of unswerving vigilance in the protection of the rights of individuals at the hands of the State. After all, a Court of Claims is a forum in which the State is the defendant, and the citizen is the plaintiff.

The District Attorney has a reputation for a more or less reactionary attitude generally, and a very reactionary attitude concerning homosexual crimes specifically. In another court within his bailiwick, a reputed case of a homosexual prostitution ring has drawn much attention from the press and the public, and the District Attorney is himself prosecuting the case with vigor. One can assume that the District Attorney has reached the same conclusion as did Henry the Eighth in the Sixteenth Century, to wit: political power can be achieved through the persecution (via the medium of prosecution) of homosexuals in the

community.

The Defendant is from Puerto Rico. Suffice it to say, at this point he believes strongly in vindicating himself and any members of any of the various oppressed minorities which which he strongly identifies. He has agreed to continue this case right up to the Supreme Court of the United States, if necessary, and it is certainly his courage and vigor in this case which has represented a radical change from the attitudes of most other similarly-situated defendants.

Lastly, there is myself; as a member of this Committee, and has General Counsel to the Mattachine Society, I have a strong interest in seeing the eradication of the statute in question. Beyond all cavil, the loitering statute is a fishnet used by society to gather up the homosexuals in its midst.

In any event, it is the self-interest of the four principals involved that has precipitated a real controversary requiring an adjudication on the Constitutional merits of this statute. This is the first major area in the analysis of the Natal case which reveals its ripeness.

The second major factor to be considered is the nature of the complainant, who in this case, as in almost all cases of this variety, is a police officer.

A little background on the nature of the relationship of a police officer to the judicial tribunal will reveal why, in this case, certain factors have been amenable to a Constitutional argument. In a small community, such as the one in which the Natal case is pending, the defendant is usually the only stranger to the courtroom mechanism. The Judge and the District Attorney see each other in court every day. More than likely, there is a small coterie of criminal defense attorneys in the community who have a substantial portion of the criminal work in that area. I have tried to explain this phenomenon to many clients in the past, and I have also tried to explain why even if they are acquitted they may receive a severe scolding from the Judge in the police officer's presence. Why, they ask, are they being treated so if they were acquitted. In each instance I have explained to my client to accept the scolding in order to help others in the future.

What is my reasoning? Brutality by police officers toward certain types of offenders, especially the homosexual offender , is a common fact. It is my belief that if the officer's need for personal vengeance is satisfied by the Judge administering a scolding to an otherwise acquitted defendant, the officer might be more likely to opt in the future to arrest a homosexual defendant rather than to brutalize him. In short, the scolding usually draws off the steam.

In the Natal case, the officer is a railroad policemen. His assignment is to the Penn-Central lines, of which the locus of the Court is only one of many intersecting points. The officer seems to be a stranger to the Court, and aside from the psychological advangage of the officer's unfamiliarity, the vested psychological influences hereinabove referred to are inoperative. In short, the Judge need not fear antagonizing the policemen with whom he must work on a daily basis.

The next major factor is common to all cases of this nature arising in the United States, viz: the legal climate. Recent United States Supreme Court cases have struck down the loitering/vagrancy type statutes as vague and over-broad. There is no question that these cases have become polestars to criminal attorneys navigating their cases through the trial courts. The cases have awakened the legal consciences of judges who were previously entrenched with the notion that a vagabond existence was, per se, evil. Furthermore, in New York State, the highest court of the state struck down another subdivision of the statute in question. Added to this, is the effect of Bill Reynard's success in the Gibson case.

In summary, the trend of the legal climate is favorable to judicial acceptance of a Constitutional thrust in this type of case.

Related to the legal climate is the social climate, which is, of course, the next factor to be considered. Undoubtedly, there has been an increased acceptance of homosexuals in the United States. The Gay Rights Movement has become part of the American scene. The importance of this fact is not to be underestimated; all the valid legal arguments in this world will not move a single judge to turn against the community in which he lives and works. But where that community has begun to change its attitudes, there is no question that a liberal judge might be a leader in the precipitation of legal change.(A factor which is also present, but one which is too recent to allow any valid analysis, is the streaking phenomenon. Certainly, one might argue that this fad has taken some of the sting experienced by society as a response to public nudity. It could also be argued that when a person is stung, he usually responds with a swat. We may be in the eye of the hurricane where society's tranquil response to streakers is a mere foreboding of a stormy reaction.Only time and observation will reveal to us the effect of this strange phenomenon on the judicial and social responses to the cases which form the concern of this Committee).

In the Natal case, the defendant was charged with loitering and with public lewdness. Both of these statutes are of questionable Constitutional validity. Certainly, the

the fact that both counts are legally infirm, creates a synergistic effect that operates in our favor. This also provides a strong incentive to the defendant to pursue his Federal Constitutional rights, since if he is successful, he is completely exonerated.

One last factor to be considered is that the locus of the court does not have a "homosexual problem". If it did, I sincerely believe that all of the other factors enumerated herein would pale.

It is my hope in this memorandum to alert my fellow-members of the Committee to some of the factors wh ich have elevated an ordinary case of a defendant charged with loitering and public lewdness into a case of Constitutional dimension.

Respectfully submitted,

MICHAEL MILLER, Esq.

Dated: May 24, 1974
9:00 a.m. Session